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IN THE
Supreme Court of the United States

BUCKEYE CHECK CASHING, INC.,

Petitioner,

v.

JOHN A. CARDEGNA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

BRIEF OF *AMICUS CURIAE* COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

JAMES T. MCINTYRE
Counsel of Record
MCINTYRE LAW FIRM, PLLC
1155 15th Street, N.W.
Suite 1101
Washington, D.C. 20005
(202) 659-3900

Of Counsel:
JAMES C. SIVON
BARNETT SIVON & NATTER, P.C.
1155 15th Street, N.W.
Suite 1101
Washington, D.C. 20005
(202) 463-6040

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Community Financial Services Association of America ("CFSA") is the national trade association for the payday advance industry, representing the owners of more than one-half of the estimated 22,000 payday advance retail outlets in the United States. *Amicus curiae* has authored this brief in whole, and has no stake in any of the parties to this litigation.[1] *Amicus curiae* has no interest in the outcome of this case, other than in seeking, on behalf of its members, the correct and consistent application of federal law to claims such as those asserted in this action.

Amicus curiae has established - and enforces among its members - responsible industry practices and appropriate consumer rights and protections ("Best Practices"). The Best Practices of *amicus curiae* (attached as Exhibit A) require its members to comply with all applicable laws and regulations; to disclose fully the terms and cost of each transaction; to limit renewals of payday advances; to encourage consumers to use this service responsibly by informing consumers of the intended use of the product and by notifying them of credit counseling alternatives; to provide consumers with a next-day right of rescission; and to refrain from the threat or pursuit of criminal action for collection purposes.

Many payday advance providers, including Petitioner Buckeye Check Cashing, Inc. and other *amicus curiae* members, include arbitration clauses in their transaction agreements. Throughout the payday advance industry, arbitration clauses are important provisions to help speedily

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[1] Petitioner, Buckeye Check Cashing, Inc., is a member of *amicus curiae*. This brief represents the perspective of *amicus curiae* and not of any party. Petitioner has not borne any portion of the cost of preparation of this brief, other than through its payments of ordinary membership dues to *amicus curiae*. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court, pursuant to S. Ct. R. 37.2.

resolve disputes in an inexpensive way. *Amicus curiae* believes that the interests of the payday advance industry and of the consuming public are best protected by the holdings of six federal courts of appeals, which have stated that the Federal Arbitration Act does not allow a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause (but not the arbitration clause itself) is void for illegality. The holdings of two state supreme courts are to the contrary, so it is in the interest of *amicus curiae* for the Court to resolve the conflict between the federal courts and the state courts. Not only will the outcome of this matter have a long-lasting and economically powerful impact on members of *amicus curiae*, it also will have far-reaching implications for financial institutions, which consistently use arbitration provisions in their credit-related agreements, as well as for consumers.

Accordingly, *amicus curiae* strongly supports Petitioner in this petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

During the past several years, the payday advance industry has become a major financial resource for millions of consumers. It is estimated that there are over 22,000 individual payday advance outlets in the United States, and that the industry provided over $40 billion in payday advances in 2003. The growth of this industry is a direct result of consumer demand. Payday advances are popular with consumers because they compare favorably with, and are often less expensive than, other alternatives.[2] The payday advance industry is heavily regulated. Payday advance providers are subject to state loan and/or check cashing laws, the disclosures mandated by the federal Truth-in-Lending Act, and the prohibitions on unfair and deceptive trade

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[2] For example, overdraft protection products and late fees.

practices contained in the Federal Trade Commission Act. Arbitration clauses have long been features of payday advance agreements. They allow payday advance customers and payday advance firms to resolve disputes in a low cost, speedy and efficient manner. Payday advance customers and payday advance firms would be denied these benefits if providers are unable to rely upon arbitration clauses included in payday advance agreements.

ARGUMENT

I. PAYDAY ADVANCES SATISFY A CONSUMER NEED AND ARE HEAVILY REGULATED

The typical payday advance involves a small, unsecured, short-term cash advance until the next payday for an employed worker who maintains a checking account. It is a very simple transaction with the finance charge expressed clearly as both a dollar amount and as an annual percentage rate ("APR"). To obtain such an advance, the consumer applies with very basic credit information and enters into an agreement that fully complies with applicable federal and state disclosure requirements, including disclosure of the APR. The consumer writes a personal check for the advance amount plus a finance charge and immediately receives the transaction proceeds by cash, electronic funds transfer or check. The lender holds the check until the borrower's payday, usually in about two weeks. Payday advances are short-term transactions and most generally are used to navigate unanticipated cash-flow problems, such as repair of an automobile needed to get to and from work; medical expenses; or an unexpected home-repair bill.

Most consumers use the product responsibly, and generally for the purpose intended, namely, to solve temporary cash-flow problems by bridging the gap between paydays. The payday advance industry serves a credit void. Traditional lenders have elected during the past decade to

abandon the small, short-term loan market. Most commercial banks generally do not make unsecured loans for less than $5,000 - and then only to high credit-quality consumers. This decision reflects the larger trend among depository institutions of under serving particular market segments perceived as unprofitable for them.

The consolidation of the banking industry has further deprived consumers of access to traditional sources of small loans. The closing of redundant bank branches has resulted in the absence of brick-and-mortar financial services storefronts in many areas of the country. Because payday advance borrowers generally have limited small-denomination sources of credit available to them, a payday advance satisfies their credit needs. Testimony of the National Taxpayers Union supports this conclusion:

> There is overwhelming evidence that payday advance loans provide a valuable service, filling a critical financial need for millions of Americans in states across the country. In one of those states, North Carolina, a recent report by the State Commissioner of Banks revealed just how well-received by consumers the payday loan option has been there. The report cited 2.9 million North Carolina transactions in 1999, with the Commissioner of Banks receiving only 12 complaints.

Testimony of Al Cors, Jr., Vice President, Government Affairs, National Taxpayers Union, before the California Assembly Committee on Business and Professions (Nov. 14, 2001).[3]

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[3] http://www.ntu.org/features/ntu_on_capitolhill/T011CorsPayDayLoan.php3.

A study that analyzes consumer satisfaction with payday advances, conducted by the Cypress Research Group in 2004, reinforces this point.[4] In the survey, 2000 payday advance customers who had obtained a payday advance within the past three months were asked about several aspects of their satisfaction with their recent payday advance. Those customers surveyed indicated the following:

- In comparison to other financial products with which they had recent experiences, the payday advance was among the most highly rated (75% satisfied), second only to check overdraft protection.
- Customers surveyed were highly satisfied with general aspects of the payday advance experience, such as the level of service during the application process (88% satisfied), the level of service while the payday advance was outstanding (85%), and the payday advance itself (82%).
- Regarding other aspects of the payday advance, 85% were satisfied with the ability to renew the payday advance, 82% were satisfied with the maximum payday advance amount allowed, and 77% were satisfied with the payday advance repayment schedule.

The results of this survey indicate strong consumer satisfaction with the payday advance industry.[5]

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[4] Cypress Research Group on behalf of CFSA, "Payday Advance Customer Satisfaction Survey," May 2004.

[5] *See id.* pp. 4-5.

In addition, with respect to pricing of the product, a recently released study by the Federal Deposit Insurance Corporation's Center for Financial Research[6] suggests that payday advances are not excessively priced when all of the costs associated with making the advance are considered. The authors concluded that, "[t]o a great extent, the 'high' APRs implied by payday loan fees can be justified by the fixed costs of keeping stores open and the relatively high default losses suffered on these loans."[7] The study found that the structure of the payday advance product makes it costly to provide such short-term advances, and that the product's default rates substantially exceed the usual credit losses at financial institutions.[8]

Payday advance firms are subject to state and federal regulation. As a general rule, they may operate only in those states in which they may be licensed. Currently, 37 states and the District of Columbia have adopted such licensing statutes. The only exception to this general rule is that some payday advance firms act as agents for commercial banks in a few states that do not otherwise license payday advance providers. In those instances, however, the payday advance firm only provides marketing and administrative services to the commercial bank, which enters into the loan agreement with the borrower and funds the loan.

State licensing statutes typically impose a number of conditions on payday advance firms. These include limits on the overall advance amount, the term of the advance,

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[6] Flannery and Samolyk, "Payday Lending: Do the Costs Justify the Price?," Federal Deposit Insurance Corporation Division of Insurance and Research, April 2005.

[7] *Id.* at 21.

[8] *See id.* p. 2.

maximum fees that can be charged and the number of renewals. Some states also mandate 'cooling off' periods between transactions, and others prohibit payday advance providers from conducting a transaction with a customer who has an outstanding payday advance from another firm.

The principal federal laws relevant to payday advances are the Truth-in-Lending Act, 15 U.S.C. §§ 1601 *et seq.*, and the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.* The Truth-in-Lending Act requires that payday advance firms disclose the cost of a payday advance in dollar amount and annual percentage terms. When the Federal Reserve Board, which implements the Truth-in-Lending Act, proposed a regulation subjecting payday advances to this disclosure requirement, CFSA filed a comment in support of the regulation.

Section 5 of the Federal Trade Commission Act prohibits companies such as payday advance firms from engaging in unfair and deceptive marketing practices, and empowers the Federal Trade Commission to take civil actions against any company that engages in such practices.[9]

II. ARBITRATION CLAUSES IN THE PAYDAY ADVANCE INDUSTRY ARE IMPORTANT AND USEFUL TO CONSUMERS

Since the mid-1990s, the trend toward including arbitration clauses in consumer agreements has accelerated dramatically. Congress, via the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, and many states, through adoption of the Uniform Arbitration Act, have recognized the importance of arbitration in contract disputes. In the payday advance industry, arbitration clauses in consumer agreements have become standard. Given the small amount of a payday

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[9] 15 U.S.C. § 45.

advance, arbitration is particularly well-suited to resolve disputes.

Arbitration provides many important advantages for both businesses and consumers in resolving disputes: it provides efficient resolution and fair access to justice; it is usually less expensive and faster than litigation; it is often less disruptive and hostile as uncertainties regarding the dispute resolution process are avoided; and arbitrators can be chosen for their expertise in the subject matter in dispute. Other advantages include simpler procedural and evidentiary rules and flexibility with respect to scheduling hearings.

The case for arbitration has been set forth by Congress a number of times over the years. In recommending passage of the Federal Arbitration Act in 1924, the Senate Judiciary Committee determined that arbitration allows parties to "avoid the delay and expense of litigation," and so appealed to "business . . . as well as to individuals."[10] Years later, in 1982, a House Committee found that "[t]he advantages of arbitration are many; it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive . . . [and] it is often more flexible in regard to scheduling of times and places of hearings."[11] More recently, Congress stated in the Y2K Act that arbitration is useful because "individuals already find [the legal] system inaccessible because of its complexity and expense."[12]

In February 2005, the National Arbitration Forum, one of the country's three leading alternative dispute resolution

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[10] S. Rep. No. 68-536, at 3 (1924).

[11] H.R. Rep. No 97-542 (1982).

[12] 15 U.S.C. §§ 6601 *et seq.*.

organizations, announced that a study conducted by Ernst & Young, entitled *Outcomes of Arbitration: An Empirical Study of Consumer Lending*,[13] confirmed that consumers find the arbitration process to be advantageous and beneficial in resolving disputes. Results of the study revealed that consumers prevail in arbitrations conducted by the National Arbitration Forum at the same rate they prevail in state court - 55%. A survey taken as part of the study of a small random sample of claimants in consumer arbitration reinforced consumer satisfaction with respect to resolution, process, cost, and timeliness of arbitration. Consequently, it is in the interest of both lenders and consumers to resolve disputes in arbitration rather than in traditional lawsuits.

CONCLUSION

For the reasons set forth above, *amicus curiae* strongly supports Petitioner and urges the Court to resolve the conflict among certain state supreme courts and federal circuit courts of appeal on the issue of whether the Federal Arbitration Act allows a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause (but not the arbitration clause itself) is void for illegality.

Respectfully submitted,

James T. McIntyre
Counsel of Record
McIntyre Law Firm, PLLC
1155 15th Street, N.W.
Suite 1101
Washington, D.C. 20005
(202) 659-3900

Of Counsel:
James C. Sivon
Barnett Sivon & Natter, P.C.
1155 15th Street, N.W.
Suite 1101
Washington, D.C. 20005
(202) 463-6040

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[13] http://www.arb-forum.com/EY_2005.pdf.

APPENDIX

EXHIBIT A

Best Practices for the Industry

To be a member in good standing of CFSA, a payday advance provider must abide by the following best practices:

1. **Full disclosure.** A member will comply with the disclosure requirements of the State in which the payday advance office is located and with Federal disclosure requirements including the Federal Truth in Lending Act. A contract between a member and the customer must fully outline the terms of the payday advance transaction. Members agree to disclose the cost of the service fee both as a dollar amount and as an annual percentage rate ("APR").

2. **Compliance.** A member will comply with all applicable laws. A member will not charge a fee or rate for a payday advance that is not authorized by State or Federal law.

3. **Truthful advertising.** A member will not advertise the payday advance service in any false, misleading, or deceptive manner.

4. **Encourage consumer responsibility.** A member will implement procedures to inform consumers of the intended use of the payday advance service. These procedures will include notifying consumers that a payday advance is a short-term cash flow tool not designed as a solution for longer term financial problems and informing customers of the availability of credit counseling services.

5. **Rollovers.** A member will comply with State laws on rollovers (the extension of an outstanding advance by payment of only a fee). In States where rollovers are

not specifically allowed a member will not under any circumstances allow a customer to do a rollover. In the few States where rollovers are permitted, a member will limit rollovers to four (4) or the State limit, whichever is less.

6. **Right to rescind.** A member will give its customers the right to rescind, at no cost, a payday advance transaction on or before the close of the following business day.

7. **Appropriate collection practices.** A member must collect past due accounts in a professional, fair and lawful manner. A member will not use unlawful threats, intimidation, or harassment to collect accounts. CFSA believes that the collection limitations contained in the Fair Debt Collection Practices Act (FDCPA) should guide a member's practice in this area.

8. **No criminal action.** A member will not threaten or pursue criminal action against a customer as a result of the customer's check being returned unpaid or the customer's account not being paid.

9. **Enforcement.** A member will participate in selfpolicing of the industry. A member will be expected to report violations of these Best Practices to CFSA, which will investigate the matter and take appropriate action. Each member company agrees to maintain and post its own toll-free consumer hotline number in each of its outlets.

10. **Support balanced legislation.** A member will work with State legislators and regulators to support responsible legislation of the payday advance industry that incorporates these Best Practices.

11. **Relationships with financial institutions.** A member may market and service payday advances made by a federally insured financial institution, provided the financial institution does the following: (1) sets its own credit criteria; (2) approves and funds each advance; (3) complies with applicable State disclosure requirements, where not inconsistent with Federal law; (4) complies with applicable State law as to the number of rollovers; (5) permits the member to purchase no more than a de minimis amount of the advances, or any such other amount which may be consistent with safety and soundness determinations by Federal or State banking regulators; (6) complies with the guidelines and regulations on payday lending issued by the financial institution's Federal or State regulator; and (7) complies with these Best Practices unless the Best Practices conflict with this Paragraph, in which case the terms of this Paragraph shall apply.

12. **Military.** A member will comply with a separate code of Military Best Practices that addresses the unique circumstances of active duty military customers. These special consumer protections include, among others: a prohibition on the garnishment of military wages or salaries and on contacting the military chain of command to collect payment; and the establishment of financial literacy initiatives that will benefit service men and women.

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